

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 29 2006

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS GONZALEZ-MARICHAL,

Defendant-Appellant.

No. 05-50331

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

D.C. No. CR-03-01692-JTM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted June 8, 2006
Pasadena, California

Before: REINHARDT and TROTT, Circuit Judges, and ROBART, District
Judge.**

Jesus Gonzalez-Marichal appeals his conviction for transporting illegal
aliens causing serious bodily injury in violation of 8 U.S.C. § 1324(a)(1)(A)(ii),

* This disposition is not appropriate for publication and may not be cited to
or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable James L. Robart, United States District Judge for the
Western District of Washington, sitting by designation.

(a)(1)(A)(v)(II), and (a)(1)(B)(iii), and for bringing in illegal aliens for financial gain in violation of 8 U.S.C. § 1324(a)(2)(B)(ii). We affirm.

The district court properly exercised its discretion to deviate from the law of the case during Gonzalez-Marichal's second trial when it withdrew a jury instruction because it lacked evidentiary support. Although the law of the case doctrine ordinarily precludes a court from reexamining a legal issue previously decided, a court properly exercises its discretion when it reconsiders a prior ruling that is clearly erroneous. See United States v. Alexander, 106 F.3d 874, 877 (9th Cir. 1997). Because there was no evidence that witness Fernando Garcia-Rodriguez received any benefit from the government in exchange for his testimony, the district court did not err in withdrawing a cautionary instruction concerning his credibility. Compare United States v. Hoyos, 573 F.2d 1111, 1116 (9th Cir. 1978) (holding that district court did not err in denying cautionary instruction because witness testimony was not tied to "the sale of specific information"), with Guam v. Dela Rosa, 644 F.2d 1257, 1259-60 (9th Cir. 1981) (holding that trial court erred in denying cautionary instruction where evidence "undisputedly show[ed] that [the witness's] testimony was secured by a promise not to prosecute").

The district court did not abuse its discretion in allowing a police officer to testify about Gonzalez-Marichal's behavior during a prior contact with law enforcement. The officer's testimony, which the government offered to rebut Gonzalez-Marichal's testimony about his ingrained fear of law enforcement, does not constitute "other acts" evidence under Fed. R. Civ. P. 404(b) ("Rule 404(b)"). See, e.g., United States v. Morgan, 376 F.3d 1002, 1007 (9th Cir. 2004) (holding that bankruptcy petition offered to rebut defendant's denial of "personal credit problems" was not prior acts evidence); United States v. Kearns, 61 F.3d 1422, 1426-27 (9th Cir. 1995) (holding that deeds showing property transfers among co-conspirators offered to rebut defendant's denial of any such participation was not prior acts evidence). Because the evidence falls outside the scope of Rule 404(b), the district court did not abuse its discretion in admitting the evidence without requiring the government to meet Rule 404(b)'s notice requirements.

AFFIRMED.